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No. 07-633

In the Supreme Court of the United States

VENETIAN CASINO RESORT, LLC, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner committed unfair labor practices, in violation of 29 U.S.C. 158(a)(1), by broadcasting a message to union demonstrators stating that they were subject to arrest for committing criminal trespass and by attempting a citizen's arrest of a union official.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 484 F.3d 601. The decision and order of the National Labor Relations Board (Pet. App. 25a-62a) are reported at 345 N.L.R.B. No. 82.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2007 (Pet. App. 65a). A petition for rehearing was denied on August 15, 2007 (Pet. App. 63a-64a). The petition for a writ of certiorari was filed on November 13, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 7 of the National Labor Relations Act (NLRA) guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. 158(a)(1).

In circumstances in which an employer has a right to exclude others from its property, the employer generally does not violate the NLRA when it prevents nonemployee union organizers from trespassing on the property to distribute union literature. See *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 537-538 (1992). That rule does not apply, however, when the employer does not have a right to exclude others. On the contrary, an employer that lacks a right to exclude violates Section 8(a)(1) when it seeks to exclude from private property nonemployees engaged in protected Section 7 activity. See *United Food & Commercial Workers Int'l Union Local 400* v. *NLRB*, 222 F.3d 1030, 1034-1035 (D.C. Cir. 2000) (*UFCW Local 400*); *NLRB* v. *Calkins*, 187 F.3d 1080, 1083, 1095-1096 (9th Cir. 1999), cert. denied, 529 U.S. 1098 (2000).[1]

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[1] See generally *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 217 n.21 (1994) ("The right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it. To the contrary, this Court consistently has maintained that the NLRA may entitle union [organizers] to obtain access to an employer's property under limited circumstances.")

b. Conduct that might otherwise violate a federal statute may be immunized from liability when necessary to ensure that the statute does not abridge the First Amendment right to petition the government. For example, activities that could be deemed to violate the antitrust laws are immune from liability under the *Noerr-Pennington* doctrine if they constitute, or are sufficiently related to, genuine efforts to petition the government. See *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight Inc.*, 365 U.S. 127, 137-138 (1961), and *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657, 669-672 (1965); see also *California Motor Trans. Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972) (recognizing that the right to petition includes a right of access to the courts). The *Noerr-Pennington* doctrine does not, however, provide antitrust immunity for every concerted effort to influence government action. *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 503 (1988) (*Allied Tube*). Rather, whether activity is immune depends on "the context and nature of the activity." *Id.* at 504. For example, immunity does not apply if the context and nature of the challenged activity indicate that it is the type of commercial activity that has traditionally had its validity determined by the antitrust laws. *Id.* at 505.

The Court has been sensitive to the First Amendment right to petition when determining whether the filing of a lawsuit violates the NLRA. For example, in *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), the Court held that, because of First Amendment concerns, Section 8(a)(1) of the NLRA does not authorize the National Labor Relations Board (Board) to enjoin as an unfair labor practice the filing and prosecution of a well-founded lawsuit, even if the suit was motivated

by the employer's desire to retaliate against the defendant for exercising rights protected by the NLRA. See *id.* at 743. And in *BE&K Construction Co.* v. *NLRB*, 536 U.S. 516 (2002), the Court held that Section 8(a)(1) does not authorize the Board to declare unlawful a completed lawsuit that was reasonably based but unsuccessful merely because it was filed for a retaliatory purpose. *Id.* at 536. In the NLRA context, neither this Court nor any court of appeals has addressed whether immunity extends to activity distinct from but related to the right to petition, such as activity incidental to the filing of a reasonably based lawsuit.

2. Petitioner operates the Venetian Casino Resort (Venetian), a luxury hotel and casino in Las Vegas, Nevada. In 1999, the Venetian was built on the site along Las Vegas Boulevard where the smaller Sands Casino and Hotel (Sands) once stood. To accommodate the projected increase in traffic, the local government agreed to expand the street by one lane, which would displace the public sidewalk in front of petitioner's property. Petitioner agreed to build a replacement sidewalk on its property that would run parallel to the street. In February 1999, the existing sidewalk was demolished and a temporary sidewalk constructed where the permanent one would be built. Pet. App. 1a-2a.

At approximately the same time, the local media reported that the Culinary Workers Union, Local 226, and Bartenders Union, Local 165 (collectively, Union), planned to hold a demonstration on the temporary sidewalk to protest the fact that petitioner, unlike the Sands, did not have a union contract. Although petitioner had not yet begun hiring staff, it had assembled an employment package for new employees, which its owner claimed was superior to the Union's. Pet. App. 2a-3a.

In an effort to prevent the demonstration from taking place, a representative of petitioner met with the local district attorney (DA). A news article published before the meeting reported that the DA had stated that the sidewalk was only "quasi-private" property and it was therefore unclear whether petitioner had a right to block or to remove demonstrators. When petitioner's representative met with the DA, the DA stated that his office would not enforce the Nevada trespass law against the demonstrators. Petitioner's representative also spoke with the Las Vegas Police Department, which told him that the police would not arrest the demonstrators for trespass. In preparation for the rally, petitioner marked its property line on the sidewalk with bright orange paint and posted signs stating that the sidewalk was private property. Pet. App. 3a-4a.

On March 1, 1999, more than 1000 demonstrators—many wearing T-shirts, buttons, and pins with union messages—marched on the sidewalk. Demonstrators carried signs, and speakers addressed the Union's labor dispute with petitioner. Throughout the demonstration, petitioner broadcast a recorded message over a loudspeaker system announcing that the demonstrating "culinary and union workers" were subject to arrest for criminal trespass on private property. Petitioner also requested that the police remove the demonstrators from the sidewalk. Petitioner's security guards told a union official who was leading the demonstration that he was being placed under "citizen's arrest," but he was not taken into custody. The next day, petitioner contacted the police to report the "arrest." Pet. App. 4a-5a.

On March 4, 1999, petitioner filed a complaint in federal district court seeking declaratory and injunctive relief against county officials, the Las Vegas Police De-

partment, and the Union on the ground that their conduct converted petitioner's private property into a public forum in violation of the Takings Clause of the Fifth Amendment. Pet. App. 5a. The district court denied petitioner's request for a preliminary injunction, holding that, because "the sidewalk performs an essential public function, [petitioner] does not have the right to exclude individuals from the sidewalk based upon permissible exercises of their right to expression under the First Amendment." *Venetian Casino Resort* v. *Local Joint Executive Bd.*, 45 F. Supp. 2d 1027, 1036 (D. Nev. 1999). The district court subsequently granted summary judgment against petitioner. The Ninth Circuit affirmed the district court's judgment, and this Court denied review. *Venetian Casino Resort* v. *Local Joint Executive Bd.*, 257 F.3d 937 (9th Cir. 2001), cert. denied, 535 U.S. 905 (2002).

3. a. Based on an unfair labor practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that petitioner violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by interfering with the Union's demonstration, which was protected activity under Section 7, 29 U.S.C. 157, when petitioner: (1) broadcast its message warning the demonstrators that they were committing criminal trespass, (2) attempted a citizen's arrest of a union official and reported the arrest to the police, and (3) summoned the police to remove demonstrators from the sidewalk. Pet. App. 30a, 32a.[2]

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[2] The complaint also initially alleged that petitioner's unmeritorious lawsuit violated Section 8(a)(1) because it was brought in retaliation for the Union's demonstration. See Pet. App. 30a & n.1, 51a-52a. After this Court's decision in *BE&K*, the General Counsel issued an amended complaint deleting that allegation. See *id.* at 52a.

b. After a hearing, an administrative law judge (ALJ) issued a decision finding that petitioner committed the unfair labor practices, as alleged, when it broadcast the trespass message, attempted the citizen's arrest, and summoned the police to remove demonstrators from the sidewalk. Pet. App. 29a-62a. The ALJ concluded that Section 7 of the NLRA protected the union demonstration. In so doing, the ALJ rejected petitioner's claim that it had the right to exclude the demonstrators from the sidewalk, noting that the federal courts had conclusively determined that petitioner had no such right. *Id.* at 44a-49a.

The ALJ also rejected petitioner's contention that its actions could not violate the NLRA because they constituted "pre-litigation activities" that were "incidental" to its March 4, 1999, federal district court lawsuit. Pet. App. 49a-57a. Petitioner claimed that its actions were "necessary prerequisites" to its direct petitioning of the federal court for declaratory and injunctive relief, because, if petitioner had not taken those actions, it would have been unable "'to establish[] the need for injunctive relief and to avoid being found to have waived' [its] right to sue." *Id.* at 53a (quoting petitioner's counsel). The ALJ concluded that petitioner's immunity defense was not supported by controlling precedent or the facts of the case. *Id.* at 54a-57a. The ALJ stated that *BE&K*, upon which petitioner relied, was inapplicable because petitioner's lawsuit was not *itself* alleged to be an unfair labor practice. *Id.* at 54a. The ALJ observed that petitioner cited no "labor related cases for [its] proposition" that *BE&K* should be expanded to include "pre-litigation activities" incidental to the filing of a lawsuit. *Id.* at 52a. And the ALJ was unconvinced that petitioner would have been "at all foreclosed from exercising its right to

petition the courts through a lawsuit without first interfering with the rights of the union demonstrators." *Id.* at 54a.

c. The Board affirmed the ALJ's findings that petitioner violated Section 8(a)(1) by broadcasting the trespass message, attempting the citizen's arrest and reporting it to the police, and summoning the police to remove demonstrators from the sidewalk. Pet. App. 25a-29a.

4. The court of appeals upheld the Board's findings that petitioner's efforts to disrupt the demonstration by broadcasting the criminal trespass message and attempting a citizen's arrest of the union agent were unfair labor practices. The court remanded the case for the Board to determine whether petitioner's summoning of the police was protected by the First Amendment as a direct petition, because the Board had not addressed that question. Pet. App. 1a-24a.

a. The court first concluded that the Union's demonstration was protected by Section 7 of the NLRA. Pet. App. 7a-16a. In doing so, the court rejected petitioner's claim that, under *Lechmere*, it had a right to deny the demonstrators access to the sidewalk. *Id.* at 13a-14a. The court explained that petitioner's argument "misses a fundamental point of *Lechmere*," which "allows an employer the right to deny access to its premises only where it has a property right to do so, and as the Ninth Circuit held, [petitioner] has no property right to the sidewalk that permits it to prevent people, like the demonstrators here, from exercising their First Amendment rights." *Id.* at 13a.

b. The court of appeals also rejected petitioner's argument that the "*Noerr-Pennington* doctrine should be extended to create a safe harbor" for petitioner's

broadcast of the trespass message and its attempted citizen's arrest. Pet. App. 17a. Petitioner contended that its activities were immune from liability under *Noerr-Pennington* because, according to petitioner, they were "pre-litigation activities" that were "necessary prerequisites" to its unsuccessful lawsuit for declaratory and injunctive relief. *Id.* at 19a-20a. Relying on *Allied Tube*, the court rejected that contention. *Id.* at 20a-21a.

The court of appeals observed that "[t]he Supreme Court has extended *Noerr-Pennington* immunity into labor law only to protect direct petitioning," such as lawsuits, but "has yet to" decide whether immunity in the labor law context covers "incidental" conduct. Pet. App. 20a (citing *Bill Johnson's Restaurants* and *BE&K*). The court concluded, however, that it did not need to decide that issue because petitioner failed "to show that its conduct was in fact 'incidental' to its lawsuit under the holding of *Allied Tube*." *Ibid.*

The court of appeals noted that *Allied Tube* rejected the "absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action." Pet. App. 19a (quoting *Allied Tube*, 486 U.S. at 503). Rather, the court stated, *Allied Tube* explained that "incidental" activity "is not protected by *Noerr-Pennington* if its 'context and nature . . . make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves.'" *Ibid.* (quoting *Allied Tube*, 486 U.S. at 505).

Adapting that test to the labor law context, the court of appeals concluded that the "'context and nature' of [petitioner's] conduct shares more with * * * [S]ection 7 cases * * * than it does with 'pre-litigation' activity." Pet. App. 21a. In support of that conclusion, the court

cited four Section 7 cases in which the Board or reviewing courts had found that activity similar to petitioner's constituted an unfair labor practice. See *id.* at 16a (citing *UFCW Local 400* v. *NLRB*, 222 F.3d at 1039; *Calkins*, 187 F.3d at 1083; *Wild Oats Market, Inc.*, 336 N.L.R.B. 179, 181 (2001); and *D'Alessandro's, Inc.*, 292 N.L.R.B. 81, 83-84 (1988)). The court also noted that "no case or statute" supports petitioner's claim that its actions were "necessary prerequisite[s]" to its lawsuit. *Id.* at 20a. Indeed, the court observed, "[t]here is no evidence that [petitioner's] conduct is customary 'prelitigation' activity." *Id.* at 21a. And, the court concluded, petitioner's claim that its actions were intended to give notice of trespass as required by Nevada trespass law was irrelevant, because petitioner did not file a trespass lawsuit, but a suit seeking "forward-looking relief"—an injunction and declaratory judgment. *Ibid.*

The court also found unavailing petitioner's reliance on *Sosa* v. *DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006). Pet. App. 21a-22a. In *Sosa*, the Ninth Circuit held that a satellite television company was immune under the *Noerr-Pennington* doctrine from liability under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, for sending letters demanding payment from, and threatening litigation against, individuals it claimed had illegally accessed its satellite signal. *Sosa*, 437 F.3d at 925-926, 942. The court of appeals explained that *Sosa* was "of no help" to petitioner because its holding was "limited to a narrow category of 'incidental' activity: '[p]relitigation communication[] demanding settlement,' that the [Ninth Circuit] found had a 'sufficiently close' connection" to the right to access the courts. Pet. App. 22a (quoting *Sosa*, 437 F.3d at 936). The *Sosa* court cited several reasons

for that holding, including the facts that letters inviting parties to settle legal claims before a lawsuit are "a common, if not universal, feature of modern litigation," and that "many states, including California, protect prelitigation communications under statutorily granted litigation privileges." 437 F.3d at 936. The court of appeals noted that here, in contrast to *Sosa*, petitioner's "broadcasting the trespass warning message and making the 'citizen's arrest' ha[d] nothing at all to do with the right to 'access[] the courts.'" Pet. App. 23a (quoting *Sosa*, 437 F.3d at 936). Thus, the court concluded, petitioner would not be entitled to immunity even under "the reasoning of the *Sosa* court," "because [petitioner] cannot show that its 'pre-litigation' activities are 'sufficiently close' to its lawsuit." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. This Court's review is therefore not warranted.

1. The court of appeals correctly noted that this Court "has extended *Noerr-Pennington* immunity into labor law only to protect direct petitioning," such as the lawsuits at issue in *Bill Johnson's* and *BE&K*, and the Court "has yet to" decide whether immunity in the labor law context covers "incidental" conduct. Pet. App. 20a. Indeed, neither this Court nor any court of appeals has decided whether *Noerr-Pennington* immunity applies to activity "incidental" to direct petitioning in the labor context. The court of appeals appropriately declined to decide that question of first impression in this case because it correctly determined, under principles established by this Court in *Allied Tube*, that petitioner failed

to demonstrate "that its conduct was in fact 'incidental' to its lawsuit." *Ibid.*

As the court of appeals explained, *Allied Tube* held that, in the antitrust setting, "incidental" activity "is not protected by *Noerr-Pennington* if its 'context and nature . . . make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves.'" Pet. App. 19a (quoting *Allied Tube*, 486 U.S. at 505). It follows that, even assuming that immunity in the labor-law context extends to activity that is "incidental" to direct petitioning, activity is not "incidental" if its "context and nature" make it the type of activity that has "traditionally had its validity determined by the [labor] laws themselves." *Allied Tube*, 486 U.S. at 505.

As the court of appeals correctly concluded (Pet. App. 19a-21a), petitioner's efforts to disrupt the Union's demonstration by broadcasting the criminal trespass message and attempting a citizen's arrest of the Union's agent are the kind of activity that has "traditionally had its validity determined by the [labor] laws." *Allied Tube*, 486 U.S. at 505. It is well settled that an employer that lacks a right to exclude others from property violates Section 8(a)(1) when it seeks to exclude nonemployees engaged in protected Section 7 activity. See *UFCW Local 400*, 222 F.3d at 1034-1035; *Calkins*, 187 F.3d at 1083, 1095-1096. And there are numerous cases in which conduct like petitioner's has been found to violate Section 8(a)(1). See Pet. App. 16a (citing cases). Moreover, as the court of appeals observed, "[t]here is no evidence that * * * conduct [like petitioner's] is customary 'pre-litigation' activity" for a suit seeking injunctive and declaratory relief, such as petitioner's. *Id.* at 21a. The court of appeals therefore

correctly determined that the "'context and nature' of [petitioner's] conduct shares more with * * * [S]ection 7 cases * * * than it does with 'pre-litigation' activity," *ibid.*, and petitioner's conduct is not entitled to immunity. The case-specific application of the *Allied Tube* standard to the particular circumstances of this case is not worthy of this Court's review.

2. Petitioner incorrectly contends (Pet. 8-12) that the decision of the court of appeals conflicts with *Sosa* v. *DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006). Contrary to petitioner's contention (Pet. 9-10), there is no conflict with *Sosa* on the question whether *Noerr-Pennington* immunity under the NLRA extends to conduct that is "incidental" to direct petitioning. Neither court of appeals decided that question. The court below expressly declined to decide the question because the court concluded that petitioner had not established that its conduct was, in fact, "incidental" to its lawsuit. See Pet. App. 20a. And the Ninth Circuit did not decide the question in *Sosa* either, because that case involved the application of *Noerr-Pennington* immunity under RICO, not the NLRA. See *Sosa*, 437 F.3d at 925-926, 932-942.

Moreover, as the court below explained, *Sosa* is inapposite because its holding was "limited to a narrow category of 'incidental' activity: '[p]relitigation communication[] demanding settlement,' that the [Ninth Circuit] found had a 'sufficiently close' connection" to litigation. Pet. App. 22a (quoting *Sosa*, 437 F.3d at 936). As the court below correctly concluded, petitioner failed to establish that its conduct had the same kind of close connection to its subsequent lawsuit. *Id.* at 22a-23a. Petitioner's fact-bound disagreement with the court of ap-

peals on that question (Pet. 10-11) does not warrant this Court's review.[3]

Petitioner also erroneously contends that the decision below conflicts with *Sosa* because, according to petitioner, it "suggest[s] that [petitioner] was required to show that its pre-litigation actions were 'necessary prerequisite[s]' to injunctive relief in order to establish that the conduct was 'incidental' to its lawsuit." Pet. 11-12 (quoting Pet. App. 20a). Contrary to that contention, the court below did not hold that petitioner was entitled to immunity only if it showed that its conduct was "necessary prerequisite" to its lawsuit. Rather, the court correctly applied the "context and nature" inquiry that this Court employed in *Allied Tube*. See Pet. App. 20a-21a. The court of appeals addressed whether petitioner's conduct was a "necessary prerequisite[]" to its lawsuit only because *petitioner* argued that it was and that petitioner therefore qualified for immunity. See *id.* at 20a (quoting Pet. C.A. Br. 25). Petitioner cannot fault

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[3] Petitioner seeks to remedy the failure of proof found below by arguing for the first time in this Court that its actions constituted prelitigation activities under *Sosa* because they are "common features of litigation," or "authorized means of responding to unlawful trespass," under Nevada law. Pet. 10-11. Before the Board, however, petitioner argued only that its actions were incidental to its right to petition because they were "necessary prerequisite[s]" to its lawsuit for declaratory and injunctive relief, and petitioner made the same argument to the court below. See Pet. App. 20a (quoting Pet. C.A. Br. 25); *id.* at 53a (quoting petitioner's counsel). Having failed to raise its new arguments to the Board, and having alleged no "extraordinary circumstances" that would excuse its failure to do so, petitioner is jurisdictionally barred from raising them in this Court. See 29 U.S.C. 160(e); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

the court of appeals for addressing petitioner's argument on its own terms.

3. Petitioner also incorrectly contends (Pet. 12-17) that this Court's review is warranted because the decision below contradicts *Lechmere* and misconstrues *Allied Tube*. The court of appeals' decision is entirely consistent with both *Lechmere* and *Allied Tube*.

Petitioner argues (Pet. 12-16) that *Lechmere* "plainly contradicts" the court of appeals' conclusion that petitioner's "conduct is of a type that 'has long been held to be governed by the NLRA.'" Pet. 13 (quoting Pet. App. 21a). Petitioner bases that argument on its assertion that *Lechmere* holds that "an employer generally is entitled to exclude nonemployee union demonstrators from its private property." Pet. 13-14. But that assertion is incorrect. As the court of appeals explained, petitioner "misses a fundamental point of *Lechmere*," which "allows an employer the right to deny access to its premises only where it has a property right to do so." Pet. App. 13a-14a. See *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 217 n.21 (1994); *Calkins*, 187 F.3d at 1088. Here, the Ninth Circuit's decision resolving petitioner's lawsuit definitively established that petitioner did not have the property right it claimed. See *Venetian Casino Resort* v. *Local Joint Executive Bd.*, 257 F.3d 937, 941, 948 (2001), cert. denied, 535 U.S. 905 (2002). Because petitioner did not have a right to exclude the demonstrators from the sidewalk, its interference with the protected union demonstration is conduct governed and prohibited by the NLRA.

Contrary to petitioner's contention, *Lechmere* does not hold that an employer's "good faith" attempt to protect its private property "ordinarily [is] immune from Board scrutiny." Pet. 15. Petitioner cites nothing in

Lechmere to support that contention, which cannot be squared with general legal principles underlying the NLRA. An employer may be held accountable under the NLRA when it interferes with activity protected by Section 7 in the good-faith but mistaken belief that employees were engaged in misconduct. See, *e.g.*, *NLRB* v. *Burnup & Sims*, 379 U.S. 21, 23-24 (1964) (good-faith but mistaken belief that employees engaged in protected activity had engaged in misconduct no defense); *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945) (rejecting employer's claim of a right to ban its employees from engaging in organizing activities in nonwork areas on nonwork time).

Petitioner also contends (Pet. 16-17) that the court ofappeals' decision is inconsistent with *Allied Tube* because the court denied petitioner immunity even though it did not find that petitioner acted with an improper motive. Contrary to that contention, *Allied Tube* does not hold that immunity is unavailable only when a defendant acts with an improper motive. Although the Court's decision indicates that motive may be relevant, it makes clear that motive is not determinative. See *Allied Tube*, 486 U.S. at 504 ("The ultimate aim is not dispositive."); see also *id.* at 509-510 (stating holding in terms that do not require an improper motive). The court of appeals' decision is fully consistent with *Allied Tube*.

4. Petitioner also contends (Pet. 17-19) that the court of appeals' decision conflicts with *Noerr* and *BE&K* because the court failed to vacate the Board's finding that petitioner violated the NLRA by reporting its attempted "citizen's arrest" to the police. Petitioner asserts (Pet. 17) that its conduct in reporting the attempted arrest amounted to direct petitioning that was entitled to im-

munity under *Noerr* and *BE&K*. As petitioner acknowledges, however, the court of appeals "did not explicitly address" the question whether reporting the arrest was protected conduct. *Ibid.* Because the court of appeals did not address the issue, there is no conflict with *Noerr* or *BE&K*.

Although petitioner (Pet. 17) faults the court of appeals for failing to address the issue, the court was not required to do so because petitioner only summarily raised the issue in its briefs below. It is well settled that a court "will not address an 'asserted but unanalyzed' argument because 'appellate courts do not sit as self-directed boards of legal inquiry and research, but [rather] as arbiters of legal questions presented and argued by the parties.'" *SEC* v. *Banner Fund Int'l*, 211 F.3d 602, 613-614 (D.C. Cir. 2000) (citation omitted) (citing cases). See *United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir.) (a party must do more than "mention a possible argument in the most skeletal way, leaving the court to do counsel's work"), cert. denied, 494 U.S. 1082 (1990).

In the court of appeals, petitioner asserted, without argumentation or analysis, that "[t]he First Amendment gave [it] the express right to . . . make a report on an attempted citizen's arrest," claiming, in a conclusory fashion, that the report constituted a "direct and 'genuine effort[]' by [petitioner] to 'influence . . . law enforcement practices.'" Pet. C.A. Br. 24 (quoting *Noerr*, 365 U.S. at 144) (emphasis omitted). That was the full extent of petitioner's presentation of the issue to the court of appeals. Accordingly, it was well within the court's discretion to consider the issue only summarily raised and therefore "waived." *Sitka Sound Seafoods, Inc.* v. *NLRB*, 206 F.3d 1175, 1180-1181 (D.C. Cir. 2000)

(holding that argument "merely refer[red] to" in party's opening brief is waived).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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